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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NO._____, OCTOBER TERM, 1973

74-5176

DANIEL EDWARD HENRY,
JOHN THOMAS KIRBY,
KENNETH WAYNE McLEAN
DAVID ALAN HAECKER,
A. C. JACKSON
AUBRY DUGLASS MIMS,
and STEPHEN L. BRAY II and
MICHAEL A. NESS, Intervenors,
Individually and on behalf of all
persons similarly situated,

Petitioners

vs.

J. William Middendorf, II,
HONORABLE ~~JOHN E. WARNER~~, Individually
and in his capacity as Secretary of
the Navy; ADMIRAL ELMO ZUMWALT, U.S.
Navy, Individually and in his capacity
as Chief of Naval Operations; GENERAL
ROBERT E. CUSHMAN, U.S. Marine Corps,
Individually and in his capacity as
Commandant, U.S. Marine Corps;
BRIGADIER-GENERAL F. C. LANG, U.S.
Marine Corps, Individually and in his
capacity as Commander, Marine Corps
Air Station, El Toro, Santa Ana,
California; and MAJOR GENERAL H. S.
HILL, U.S. Marine Corps, Individually
and in his capacity as Commander, Third
Marine Aircraft Wing, Marine Corps Air
Station, El Toro, Santa Ana, California.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 27, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported in 357 F. Supp. 495 (1973). The order of the United States Court of Appeals for the Ninth Circuit is reported in the advance sheets and a copy of said order is presented in Appendix B, infra, page 4 .

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on March 27, 1974. Its order denying a Petition for Rehearing and the suggestion for a rehearing en banc was entered on May 23, 1974. A copy of said order is presented in Appendix C, infra, page 5. The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. §. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Sixth Amendment's guarantee of assistance of counsel in criminal prosecutions, as interpreted and applied in Argersinger v. Hamlin, 407 U.S. 25 (1972), is applicable to trials before summary courts-martial.

2. Whether the Fifth Amendment's guarantee of due process of law requires the military to appoint counsel, who does not represent the prosecution, to assist the accused in every trial before a summary court-martial which may result in imprisonment.

3. Whether a district court may by mandamus extend the scope of its judgment beyond the territorial limits of its district.

4. Whether a district court may, by writ of habeas corpus, extend the scope of its judgment beyond the territorial limits of its district.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The provisions of the United States Consitution involved are the "Assistance of Counsel" clause of the Sixth Amendment and the "Due Process" clause of the Fifth Amendment. The specific statute involved, as set forth in full in Appendix A, infra, is 10 U.S.C.A. § 820, which is part of the Uniform Code of Military Justice (10 U.S.C.A. 801 et seq). The regulations involved, as set forth in full in Appendix A, infra, are Paragraphs 79a, b, c, and d, Manual for Courts-Martial (Rev. Ed. 1969).

STATEMENT OF THE CASE

Petitioners are members of the United States Marine Corps (U.S. Navy) who have been charged with minor offenses which constitute violations of the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq. Petitioners HENRY and KIRBY were charged with "unauthorized absence"; Petitioner McLEAN was charged with "unauthorized absence", "misbehavior of sentry on post" and "disrespect to a noncommissioned officer." Each of the three named above was convicted by a summary court-martial at which he was not represented by counsel and each was sentenced to confinement for a period not to exceed 30 days. Petitioners HAECKER, JACKSON, and MIMS, and the intervening Petitioners BRAY and NESS were all charged with similar infractions and ordered to stand trial at summary court-martial at which no legal counsel would be provided.

Upon request in chambers by the district court to Respondents-Defendants, no summary court-martial was conducted with respect to charges against Petitioners HAECKER, JACKSON, and MIMS prior to issuance of judgment in the action.

Intervenors BRAY and NESS were each convicted by a summary court-martial at which they were not represented by counsel and each was sentenced to confinement for a period not to exceed 30 days.

A verified petition for a Writ of Habeas Corpus of Petitioners HENRY, KIRBY, and McLEAN, individually and on behalf of all persons similarly situated, together with the Complaint of said Petitioners and of Petitioners HAECKER, JACKSON, and MIMS, individually and on behalf of all persons similarly situated, for injunctive, mandamus, and declaratory relief, and motions for a temporary restraining order and preliminary injunction, order designating action as a class action, and order allowing Petitioner-Plaintiffs to proceed in forma pauperis, were filed on February 16, 1973, in the district court.

Later the district court permitted BRAY and NESS to intervene as petitioners, ordered issuance of a Writ of Habeas Corpus as to KIRBY, BRAY and NESS and their immediate release from confinement pending further order of court with regard to their respective convictions and sentencing by summary courts-martial; and ordered Respondent-Defendants to refrain from conducting any summary courts-martial within the territorial jurisdiction of the court without affording the accused the assistance of counsel, where such proceeding might result in confinement of the accused, pending further order of court.

The district court also ordered that the Petitioner-Plaintiffs and Intervenors, each and all, be allowed to proceed in forma pauperis.

Following hearing, the district court filed and entered its Memorandum Opinion in the action on April 13, 1973, and its Judgment on April 17, 1973, granting Petitioners

relief as a class pursuant to Rule 23 (b)(3) and (c) of Federal Rules of Civil Procedure, in the form of habeas corpus pursuant to 28 U.S.C. § 2241 et seq., and in the nature of mandamus pursuant to 28 U.S.C. § 1361. The writ of habeas corpus was granted specifically on behalf of Petitioners HENRY and McLEAN in addition to that previously granted on behalf of the other named Petitioners, and on behalf of every member of the designated class.

The judgment ordered Respondents-Defendants to release said Petitioners and said class members from confinement and to direct their agents to insure that no summary courts-martial be conducted by the Navy or Marine Corps anywhere in the world unless and until the constitutional requirements of Argersinger v. Hamlin, supra, as specified in the order, are satisfied.

Finding that Navy regulations do not permit retrial of summary courts-martial, the district court ordered the findings of guilty and the sentences of Petitioners HENRY, KIRBY, McLEAN, BRAY and NESS vacated and their service records expunged of any reference thereto.

Respondents-Defendants appealed said judgment to the United States Court of Appeals for the Ninth Circuit. The latter on March 27, 1974, in an Order which it designated to be published, and "Under the compulsion" of that Court's opinion in Daigle v. Warner, 490 F. 2d 358 (9th Cir. 1973), ordered the orders and judgment of the district court vacated and the cause remanded to the district court for reconsideration in the light of Daigle. That Order also stated that two of the members of the three-judge panel that issued said Order "disagree with the holding of Daigle" and that "All members of this panel, however, follow Daigle because it is the law of this circuit".

Petitioners' Petition for Rehearing and suggestion for a rehearing en banc was rejected by an Order filed and entered on May 23, 1974.

Hearing on filing and spreading the judgment of the Court of Appeals in the district court has been continued to September 9, 1974.

REASONS FOR GRANTING THE WRIT

There is a conflict of opinion on the first two questions presented by this petition. As stated above, the Ninth Circuit panel in the instant case followed under "compulsion" the opinion in Daigle. The latter, issued on October 24, 1973, held that the "Sixth Amendment's guarantee of counsel in criminal prosecutions, as interpreted and applied in Argersinger v. Hamlin 407 U.S. 25 (1972)" is not applicable to trials before summary courts-martial, and that the "Fifth Amendment's guarantee of due process of law" does not require "the military to appoint counsel in every case in which the defendant is sentenced to confinement".

The United States Court of Appeals for the Fifth Circuit on July 5, 1974, in an opinion covering the four cases of Betonie v. Sizemore, et. al., Timmons v. Carrier, Tova v. Carrier, and Lynch v. Sizemore, et al., 496 F. 2d 1001, ruled on these two questions with conclusions diametrically opposed to that of the Ninth Circuit in Daigle.

The contrary opinion by the Fifth Circuit in Betonie, et al., was rendered with full knowledge of the Ninth Circuit's view on these questions, as the opinion cites Daigle after the statement: "Some courts have held that the Sixth Amendment does not protect defendants in courts-martial". 496 F. 2d at 1007. (The Ninth Circuit Order in the instant case was also brought to the attention of the Fifth Circuit Court at oral argument in Betonie.)

The Fifth Circuit's opinion continues at 1007:

> "But the weight of authority seems to be strongly in favor of the proposition that, although the perameters of the rule may not be identical to those in civilian proceedings, there is a right to counsel in courts-martial."

(Citations, including the district court opinion in the instant case, 357 F. Supp. 495 (1973)).

The Fifth Circuit's opinion further states at 1008:

> "We thus conclude that both the Fifth and Sixth Amendments require counsel in any court-martial proceeding in which incarceration is to be imposed as a punishment."

Thus there is a clear conflict on the first two questions here presented, with the Ninth Circuit aligned against the Fifth and Tenth Circuits and the Court of Claims and the U.S. Court of Military Appeals. (See citations in Betonie, et al., 496 F. 2d at 1007.)

Another reason for the granting of the writ was perhaps best stated by Judge Ely in his comment supplementing the Order issued by the Ninth Circuit in the instant case in which he stated that "if, under Supreme Court authority, a civilian is entitled to the assistance of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, facing much graver consequences, should be entitled to the same consideration."

That view, shared by the majority of the panel which decided the instant case in the Ninth Circuit, could not be

followed by that panel only because of the contrary precedent set by the Daigle opinion. It appears that the question whether the Daigle opinion should be nullified can only be answered by granting of the writ in the instant case.

With regard to the third and fourth questions presented herein, which were also raised below, no direct determination was made by the Court of Appeals in its order vacating the orders and judgment of the district court in following the opinion in Daigle. Those issues were not raised in the Daigle case. The questions as to scope of judgment of a district court are presented here for consideration as a material part of the instant case as it was treated below.

CONCLUSION

For all of the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 19, 1974

APPENDIX A

Title 10 U. S. C. A. § 820 - Article 20, Uniform Code of Military Justice

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

As amended Oct. 24, 1968, Pub.L. 90-632, § 2(6), 82 Stat. 1336.

Manual for Courts-Martial, (Rev. Ed. 1969)- Chapter XIV

79. **SUMMARY COURTS-MARTIAL.** ***a. Function.*** The function of a summary court-martial is to exercise justice promptly for relatively minor offenses under a simple form of procedure. The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded. Unless otherwise stated herein or in regulations of the Secretary of a Department, the procedure prescribed for a general court-martial will, when applicable, serve as a guide for a summary court-martial. See appendix 8*b* in this connection. See also 137.

b. Power to obtain evidence. A summary court has the same power as the trial counsel of a general or special court-martial to compel the attendance of civilian witnesses by subpoena (115; Art. 46) and to take depositions in proper cases (117; Art. 49). To obtain the attendance of witnesses, the summary court will take action similar to that taken by the trial counsel of a general or special court-martial. In this connection, see 44*f*(2).

c. Examination of file. When charges are referred to a summary court-martial, the court will carefully examine the charges and allied papers to see that the charges are in proper form and that the data on the charge sheet and any evidence of previous convictions are complete and free from error of substance or form. The summary court will report to the convening authority any substantial irregularity in the charges or accompanying papers. Ordinarily, the court will correct and initial slight errors or obvious mistakes in the charges, but if substantial changes are required, the court will refer the matter to the convening authority. See 33*d*.

-/-

d. Trial procedure. (1) *Determining jurisdiction.* After determining that the charges and other data are in proper form, the summary court should arrange for the presence of the accused. When the accused appears, the court should advise him of the following matters: the general nature of the charges; the fact that they have been referred to a summary court-martial for trial; who convened the court; the name of the accuser; the names of the witnesses who will probably be called; the right of the accused to cross-examine them or have the court ask any questions which the accused desires answered; the right of the accused to call any witnesses or produce any evidence in his own behalf with the assurance that the court will assist him in every possible way to do so; his right to testify on the merits or to remain silent (148*e*; app. 8*a*; Art. 31) and, after any findings of guilty are announced, to make an unsworn statement in mitigation or extenuation of any offense of which he may be convicted (75*c*; app. 8*a*); the maximum sentence which the court can adjudge if the accused is found guilty of the offense or offenses charged.

The summary court will also advise him of his right to object to trial by summary court-martial (Art. 20) and will ask him whether he consents or objects to trial. After giving the accused a reasonable time to consider the question, the summary court will record his response in the space provided on the charge sheet. If the accused objects to trial, the summary court will note those facts on the charge sheet and will return the charges and allied papers to the convening authority. If the accused consents to trial, the summary court will proceed with the trial.

(2) *Arraignment and pleas.* After complying with the provisions of the preceding paragraph (79*d*(1)) and determining that it has jurisdiction over the accused, the summary court will read or show the charges and specifications to the accused. Any necessary explanation of the charges may be made. The accused should then be asked how he pleads to each specification and charge.

If the accused pleads guilty to any specification or charge, the summary court should explain to him the meaning and effect of the plea. This explanation should include the following:

The elements of the offense to which the plea of guilty relates;

That, as to the offense to which the plea of guilty relates, the plea admits every element charged and every act or omission alleged and authorizes conviction of the offense without further proof;

The maximum authorized punishment which may be adjudged upon conviction; and

That the maximum authorized punishment may be adjudged upon conviction of the offense. See 70*b*(2).

A plea of guilty will not be accepted unless the summary court-martial after questioning the accused is satisfied not only that the accused understands the meaning and effect of his plea and admits the allegations to which he has pleaded guilty but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty. See 70*b*(3).

If the accused desires to change his plea, or if the summary court is in doubt as to his understanding and desire to plead guilty, or if at any time during the trial the accused makes a statement, sworn or unsworn, inconsistent with his plea of guilty, a plea of not guilty will be entered. If a plea of guilty to all specifications and charges is allowed to stand, the court may proceed at

-2-

once to find the accused guilty. However, the court may, in the interest of justice, proceed with the trial and consider evidence on the merits. If, after hearing evidence on the merits, the court believes the plea of guilty to have been improvidently entered, it shall enter a plea of not guilty and proceed as though the accused had pleaded not guilty. See 70 and Article 45.

(3) *Presentation of evidence.* If the accused has pleaded not guilty or if following a plea of guilty evidence on the merits or in extenuation or mitigation is to be received, arrangements will be made for the attendance of necessary witnesses. Witnesses should be excluded from the courtroom until called to testify. Witnesses for the prosecution will be called first and examined under oath as to all matters relevant to the offense charged. The accused will be extended the right to cross-examine these witnesses. The summary court will aid the accused in the cross-examination, and, if the accused desires, will ask questions suggested by the accused. On behalf of the accused, the court will obtain the attendance of witnesses, administer the oath and examine them, and obtain such other evidence as may tend to disprove or negative guilt of the charges, explain the acts or omissions charged, show extenuating circumstances, or establish grounds for mitigation. Before determining the findings, he will explain to the accused his right to testify on the merits or to remain silent and will give the accussed full opportunity to exercise his election. See appendix 8*b* for form of explanation.

(4) *Findings and sentence.* The applicable principles stated in 74 and 76 should be considered by a summary court-martial in determining the findings and sentence, respectively. The court will announce the findings to the accused as soon as they are determined. If the accused has been found guilty of any offense, the summary court will advise him of his right to submit matter in extenuation or mitigation, including the making of an unsworn statement (75*c;* app. 8). Before determining the sentence, the summary court will show or read to the accused any admissible evidence of previous convictions (75*b*(2)) and the personal data appearing on the charge sheet and will ask him whether they are correct. If the accused claims they are not correct in any particular, the court will determine the issue (75*b*(1), (2)). The court will advise the accused of the sentence as soon as it is determined. If the sentence includes confinement, the summary court will take such action as may be prescribed by the convening authority to have the accused delivered to an appropriate place of confinement. The court will also advise the accused of his right to apply to the convening authority for deferment of service of the confinement. See 88*f*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL EDWARD HENRY, etc., et al., individually and on behalf of all persons similarly situated, and STEPHEN L. BRAY, II, and MICHAEL A. NESS, Intervenors,

Plaintiffs-Appellees,

vs.

HONORABLE JOHN E. WARNER, individually and in his capacity as Secretary of the Navy, et al.,

Defendants-Appellants.

No. 73-1694

ORDER

[March 27, 1974]

[PUBLISH]

Before: ELY, HUFSTEDLER, and TRASK, Circuit Judges.

Under the compulsion of this court's opinion in *Daigle v. Warner* (9th Cir. 1973) 490 F.2d 358, the orders and judgment are ordered vacated and the cause is remanded to the district court for reconsideration in the light of *Daigle*.*

*Judges Ely and Hufstedler disagree with the holding of *Daigle* in that both believe that, absent emergency circumstances, the due process clause requires the appointment of counsel or a counsel substitute in all summary courts martial, without the limitations placed upon that right by the majority of the *Daigle* panel. Judge Ely adds his thought that if, under Supreme Court authority, a civilian is entitled to the assistance of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, facing much graver consequences, should be entitled to the same consideration. Judge Trask adheres to his views expressed, concurring and dissenting, in *Daigle*. All members of this panel, however, follow *Daigle* because it is the law of this circuit.

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APPENDIX-C

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL EDWARD HENRY, etc., et al., individually and on behalf of all persons similarly situated, and STEPHEN L. BRAY, II, and MICHAEL A. NESS, Intervenors, Plaintiffs-Appellees, v. HONORABLE JOHN E. WARNER, individually and in his capacity as Secretary of the Navy, et al., Defendants-Appellants.	No. 73-1694

O R D E R

Before: ELY, HUFSTEDLER, and TRASK, Circuit Judges.

The Clerk is directed to file the untimely Petition for Rehearing and suggestion for rehearing en banc. The Clerk is further directed to file the "Ex Parte Application For Permission To File Memorandum Of Late Reported Decision," received in the Clerk's office on May 6, 1974.

The panel as constituted in the above case has voted to deny the Petition for Rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. 35(b) Fed. R. App. P.

The Petition for Rehearing is denied and the suggestion for a rehearing en banc is rejected.

United States Circuit Judges

FPI-Barcelona
8-30-69-4CM-4371